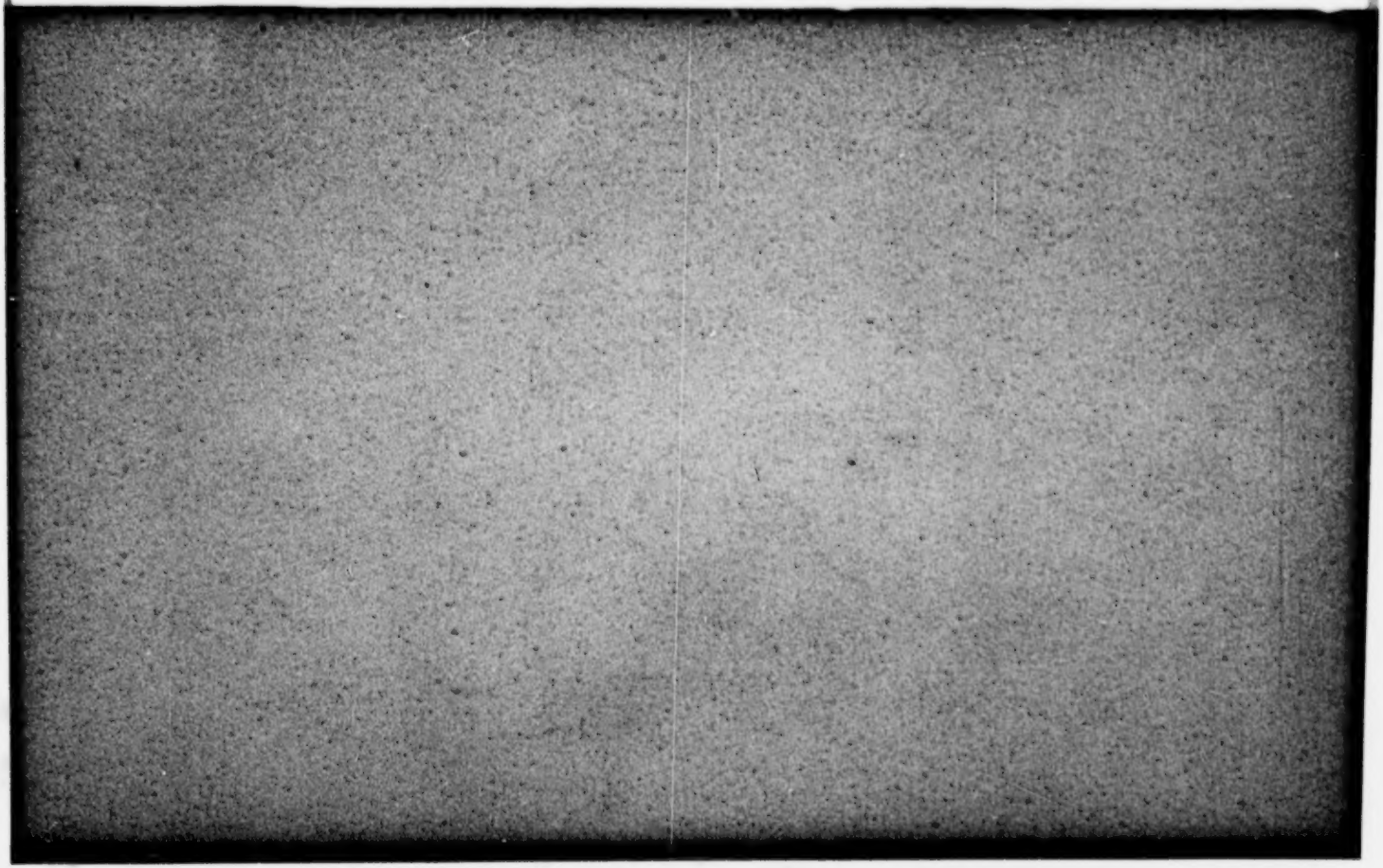

SUPREME COURT, U. S.

FILED

SEP 3 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973.

No. 73—1963

FREDERICK F. PORDUM,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE OF NEW YORK and EWALD B. NYQUIST, the Commissioner of Education of the State of New York, and the CITY SCHOOL DISTRICT OF THE CITY OF LACKAWANNA,

Respondents.

Brief of Petitioner in Reply to Opposing Brief of Respondents, Board of Regents and Commissioner of Education.

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Brief of Petitioner in Reply to Opposing Brief of Respondents, Board of Regents and Commissioner of Education.

Petitioner Frederick F. Pordum respectfully submits this brief in reply to the opposing brief of respondents Board of Regents and Commissioner of Education.

Reply.

Referring to page 6 of respondent Commissioner's brief in opposition, petitioner Pordum notes that, instead of having any statutory or regulatory basis for hearings, the respondent Commissioner of Education has proceeded on an entirely *ad hoc* basis in the instant case. There has been no proof put forth by any respondent that the statutory and regulatory procedures for holding teacher tenure hearings by boards of education are ap-

plicable to the respondent Commissioner of Education. A reading of *Education Law* §3020-a makes this abundantly clear. Indeed, the Commissioner of Education has found it necessary to promulgate regulations to rectify the procedural deficiencies of *Education Law* §305(7), viz. respondent Commissioner's brief in opposition, "Appendix."

A review of the "Appendix" attached to respondent Commissioner's brief is also illuminating since it is *effective September 1, 1974, and is therefore prospective* in nature. Respondent Commissioner notes at page 9 of his brief:

> "The uncontested fact of petitioner's felony conviction was in and of itself probable cause for a charge that his fitness to teach was in question."

At page 7, respondent Commissioner states that "* * * petitioner's conduct fell within the 'hard core' of prohibited conduct for teachers * * *." Petitioner Pordum submits that this is erroneous, for the Commissioner, at page 15 of his brief, states in his new regulations (83.4):

> "The fact of conviction of a crime shall *not* in and of itself create a presumption that the person convicted lacks good moral character." [Italics supplied.]

This new regulation seems to have heeded the warning implicit in footnote 14 of the decision of the Court of Appeals below (Petition, p. 49), which stated:

> "If the hearing were to proceed in this manner, with the irrebutable presumption that a person who has been convicted of committing a crime and who is on probation is unfit to teach in the public schools, it might raise serious constitutional difficulties."

These new regulations still do not satisfy due process requirements. The statute remains vague, for the regulations promulgated fail to delineate the conduct to be proscribed. The constitutionality of the statute still sets forth a substantial question requiring a three-judge court. *Goosby v. Osser,* 409 U. S. 512 (1973).

For the foregoing reasons and those made clear in the petition for a writ of certiorari, this Court should both hear and remand the instant case to be heard before a three-judge court.

Dated: August 29, 1974

Respectfully submitted,

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CERTIORARI DENIED